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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners,

vs.

T. B. SPILLER et al.,

Respondents.

No. 327.

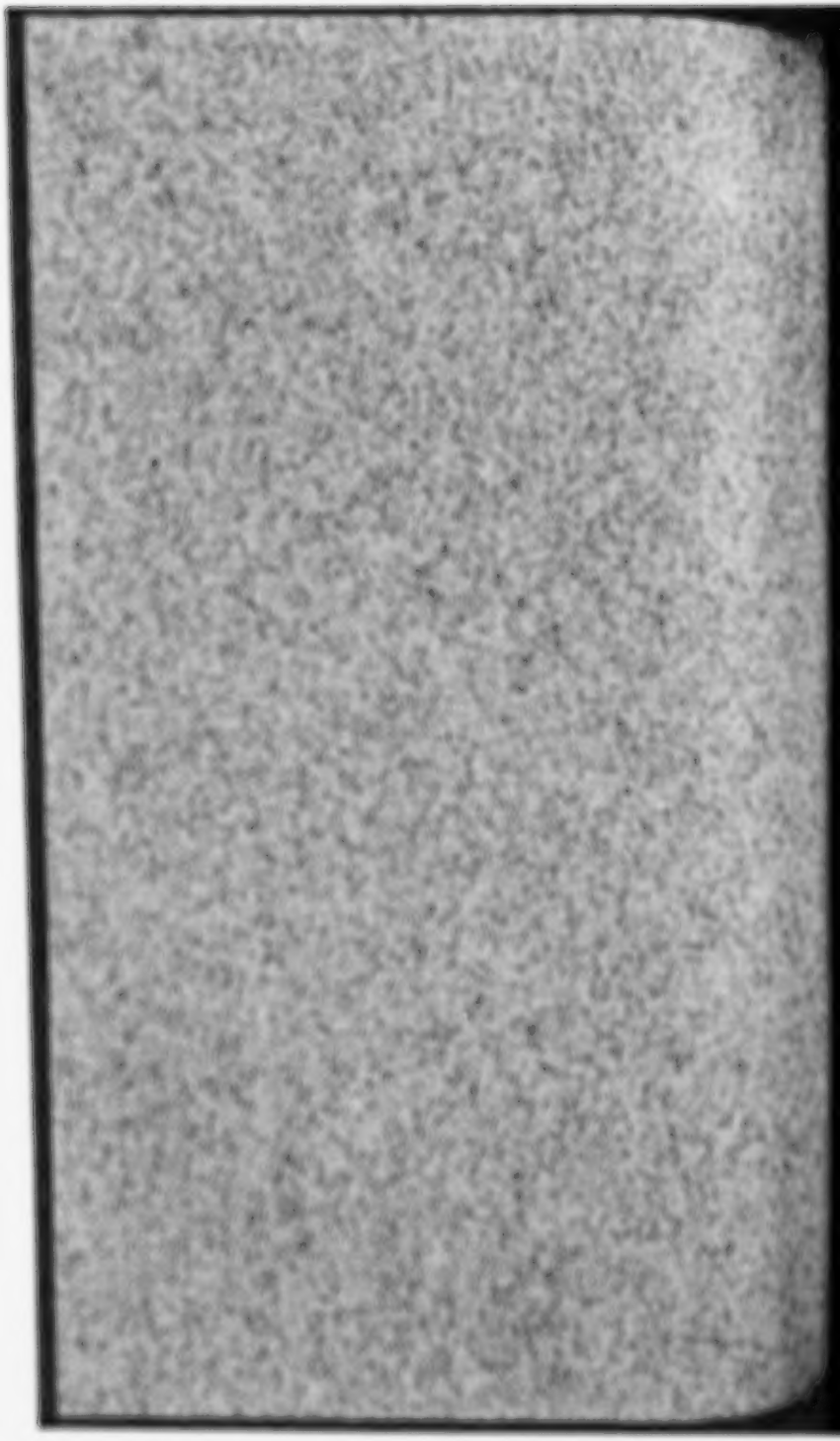
BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

J. R. COWAN,
DAVID A. MURPHY,
JOHN S. LEAVY,
WALTER H. SAUNDERS,
Attorneys for Respondents.

J. R. COWAN,
[illegible]
Fort Worth, Texas.

DAVID A. MURPHY,
[illegible]
Kansas City, Missouri.

JOHN S. LEAVY,
WALTER H. SAUNDERS,
[illegible]
St. Louis, Missouri.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners, vs. E. B. SPILLER et al., Respondents.	No. 577.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FOREWORD.

This case involves the right of certain cattle shippers to receive preferential payment under a reparation judgment rendered by this Court affirming the award of the Commission, in the case of Spiller et al. v. Atchison, Topeka & Santa Fe Railway Company, 253 U. S. 117, against nine carriers, eight of whom, presumably, have paid the judgment of this Court. During the pendency of these proceedings before the Commission for an award of reparation, which originated in an advance by certain carriers of cattle rates in the year 1903 to the extent of

3 cents a hundred from Southwestern points to various markets, the St. Louis & San Francisco Railroad Company, one of the carriers, went into the hands of Receivers on May 27, 1913, under consent proceedings (Rec., p. 11). This Railroad Company, its Receivers and its successor, have, at all times, contested the right of the shippers (respondents herein) to obtain reparation for these excess charges. The history of this litigation is well set out in the opinion of the United States Circuit Court of Appeals in this case (Rec., pp. 699 to 704), and shows that, from 1905 to date, respondents have been diligently endeavoring to recover from these petitioners the excess charges, paid by them and condemned by the Commission in its reparation orders and by this Court in its judgment supra.

Petitioners in their application do not contend that, if the excess charges were unlawfully collected from respondents, the Court of Appeals was in error in applying the doctrine of trust ex maleficio as to such excess charges, provided such fund was sufficiently identified and traced. Their contention is that because **the excess charges were collected under the published tariff** they were, therefore, "**lawfully**" collected, and for that reason there was no basis for the application of the trust ex maleficio doctrine. The decision of the District Court proceeded upon this theory, namely, the **alleged lawful collection** of the excess charges, and did not discuss the question of the identification or tracing of the funds (Rec.,

pp. 199 to 222, opinion of District Court). Previous to this opinion, the same Court had written a memorandum opinion granting leave to the respondents to intervene in the receivership suit of petitioners (Rec., pp. 57-58), which intervention asserted the right to preferential payment by reason of the trust ex maleficio doctrine, and at that time the defense, namely, the denial of the application of the trust ex maleficio doctrine by reason of the published rate, was urged and considered by the Court; the Court, however, wrote the memorandum opinion granting leave to file intervening petitions (Rec., pp. 57-58) which is as follows:

"Filed February 12, 1921.

"Sanborn, Circuit Judge:

"In view of the opinion in Love v. North American Company, 229 Fed. 123, and of the averments of the applicants, that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission they could not have enforced them in the foreclosure proceedings at any time before February 1, 1916, the limit of the time fixed for presenting claims by the orders in those proceedings; that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for the purchase of their claims and their intention to press them, the Court is not persuaded that they are barred in this

court of equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants."

It is obvious that, if the published rate theory, now and then urged by Petitioners, precluded Respondents from establishing their claim on the basis of a trust ex maleficio, then the application, at that time, should have been denied, because that objection was continuous and, if valid, was as fatal when the interventions were allowed, as it was when the District Court's decision was rendered. If that theory is sound, then there could be no reparation under the Commerce Act as developed, infra.

STATEMENT OF FACTS.

The statement of facts in the petition under paragraph I, "Statement of Matter Involved," pp. 2 to 10, both inclusive, omits some important facts, found by the Special Master and affirmed by the United States Circuit Court of Appeals in its opinion in the instant case. (Report of Special Master, Rec., pp. 123-178, and opinion of the United States Circuit Court of Appeals, Rec., pp. 699-722.)

These omitted matters are as follows:

First. That under the accepted plan of reorganization the stockholders of the St. Louis & San Francisco Railroad Company (hereafter called the Frisco Company), put into receivership by consent decree, were to receive, and did receive, more than forty-five million dollars of the stock of the new company (St. Louis-San Francisco Railway Company), as representing their equity in the property, **without the payment of anything therefor.** This is found to be a fact by the decision of the United States Circuit Court of Appeals (Rec., p. 702).

Second. That the intervenors received no offer of any kind for their claims in the reorganization, though offers were made to all other creditors, both secured and unsecured, the reason, no doubt, being, as stated in the opinion of the United States Circuit Court of Appeals that the proceedings to obtain the award and enforce it was:

"Against the constant opposition of the railroad company, its Receivers and the railway company, their claims had been established in the District Court and in the Supreme Court of the United States" (Rec., p. 721).

And the Court also said:

"Through all these years the attorneys for the railroad company, the Receivers and the railway company fought these demands of intervenors. The railway company, through its attorneys, conducted the contest in the Supreme Court of the United States. It would seem that the intervenors were about as persistently and consistently diligent as litigants could be" (Rec., p. 707).

It would be manifestly inconsistent to make an offer to intervenors when their claims were being consistently and persistently contested.

Third. "It is established by the record here that, **AT ALL TIMES AFTER THE EXCESSIVE FREIGHT CHARGES WERE COLLECTED AND DOWN TO THE RECEIVERSHIP, THE RAILROAD COMPANY HAD IN ITS TREASURY MONEY IN EXCESS OF THE CLAIMED OVERCHARGES, AND THAT IT TURNED OVER TO THE RECEIVER SOME $300,000.00**" (Rec., Opinion of the U. S. Cir. Ct. of Appls., p. 719). (Black caps ours.)

The Court found as a fact (Rec., p. 702) that in addition to this $300,000,000 "a large amount of cash (shown by the record to be over $5,000,000.00 [Special Master's Report, p. 152]) was also turned over by the Receivers to the Reorganized Railway Company, largely in excess of the claims of intervenors."

The Special Master's report (Rec., p. 150) shows that there was not a year from June 30, 1896, to May 27, 1915, the date of the consent receivership, except the year ending June 30, 1908, when the operating income exceeded operating expenses, including taxes, by $2,000,000.00, that the operating income of the Frisco Company did not exceed its operating expenses, including taxes, by over $15,000,000.00.

The Special Master also finds (Rec., p. 170) that the operating income of the Frisco Railroad Company from June, 1896, to May 27, 1915 (the date of the consent receivership), was over $95,000,000.00, that, during the receivership, the operating revenues largely exceeded the operating expenses, including taxes. "The Receivers turned over to the Railroad Company (the new company) over $5,000,000.00, after paying out large sums of money from operating income as interest on bonded indebtedness and for betterments to the road and to the equipment, and for the purchase of new equipment" (Rec., p. 170).

With this splendid financial record, the intervenors might well ask: Why a consent receivership?

Fourth. The Special Master in his report (Rec., p. 162) finds that the Interstate Commerce Commission stated its conclusion in its opinion in the case of Cattle Raisers Association of Texas v. M. K. & T. Ry. Co. et al., 11 I. C. C. Rep. 296, l. c. 352, as follows:

> "It has been found that the advances made during the year 1903, as shown by the appendix, were unjust and unreasonable, and that the present rates are unjust and unreasonable by the amount of said advances. The defendants should, therefore, be required to cease and desist from the maintenance of these rates. * * *
>
> **"All questions of reparation are reserved."**

Subsequently, upon petition of the respondents to reopen this matter before the Commission, on April 14, 1908 (13 I. C. C. Rep. 418), the Commission reaffirmed its position of August 16, 1905, and again pronounced the rates excessive and unreasonable by the amount of the said advances (Opinion of the U. S. Cir. Ct. of Apps., Rec., pp. 699-700), and entered an order to that effect, which shows that the Commission, despite the fact that these rates were published, continuously condemned them as unjust and unreasonable to the extent of the 3-cents-per-hundredweight advance, which the Commission by its reparation award directed the carriers to pay.

This brings us, therefore, to a consideration of the grounds advanced in the petition for the issuance of a writ of certiorari in this case, and to the arguments and authorities offered in support thereof.

STATEMENT OF ALLEGED HOLDINGS OF UNITED STATES CIRCUIT COURT OF APPEALS.

(Petition, p. 7.)

On pages 7 to 10 of the petition are set out the alleged holdings of the Circuit Court of Appeals in the instant case, which respondents assert require some correction.

These holdings are set out under six heads.

Point 1 asserts that the Court held that intervenors are not barred from presenting their claims by laches, either

(a) by reason of their delay, or

(b) by reason of failing to file their claims, as required by the interlocutory decree entered in the receivership case.

Point 2 states the holding of the Court in regard to the construction of the terms of the interlocutory and final decrees and the order of confirmation of sale, and the holding that intervenors were entitled to present their claims, after the expiration of the time limited thereby.

Since in the brief no attempt was made to discuss either the proposition of laches or the effect of the construction of the terms of said decrees and order of confirmation, it is safe to assume that these two points have been abandoned by petitioners. The reasoning of the Court in its opinion on these two points (Rec., pp. 704-710) as to laches, and (Rec., pp. 710-714) as to the construction of

said decrees, is so conclusive that we merely refer the Court to the reasoning of the opinion on these two points to show that there is no merit in them.

Point 3, page , contains a misstatement of the Court's holding in regard to the action of the Commission, as above pointed out, because it asserts that the Commission **afterwards** found the excess rate charges to be unjust and unreasonable and hence unlawful, and that the finding of the Court that the railroad company became a trustee ex maleficio for the benefit of intervenors of such money so collected, was based upon the **alleged said subsequent finding of the Commission.**

On the contrary, the Court specifically held, as above stated, that, since the excess charges were unjust and unreasonable, they were, ipso facto, unlawful when collected, under section 1 of the act, that they were exacted under duress, under the compulsion of the statute, section 6, requiring the published tariff rate, and that said charges were condemned by the Commission as unjust and unreasonable by its decisions above referred to, both **prior** to their collection and subsequent thereto (Rec., pp. 715-716, and Rec., pp. 699-700).

Point 4 also contains an omission of facts found as the basis of the Court's holding. It omits any reference whatever to the fact, above set out, as to the $300,000.00 always carried by the railroad company in its treasury and paid over to the Receivers and held by them, and the

$5,000,000.00 sum paid over by the Receivers to the reorganized railway company. It also omits the fact that there were no other claimants to this fund except intervenors and a man named Love (Love v. North American Co., 229 Fed. 103), whose claim was paid under the judgment of the United States Circuit Court of Appeals of the Eighth Circuit (Rec., pp. 718-721; report of Special Master, pp. 150-151). And that after the payment of such claim there was still in the treasury of the railroad company at all times an amount of money largely in excess of claims of intervenors, which was turned over to the Receivers, as above stated; it also omits the further fact found by the Court that no offer of any kind was made to the intervenors, although offers were made to all other creditors of the Frisco Company, both secured and unsecured, and that the railroad company, prior to receivership, during receivership and subsequent thereto, and its successor at all times consistently opposed the claims of intervenors; it also omits the fact that under the decree requiring the Receivers to list all claims asserted against the railroad company or its Receivers the Receivers failed and refused to list intervenors' claims. The petition makes no reference to the service of the Commission's reparation order upon the railroad company or its Receivers, which is required by the Commerce Act, and presumably was served. This point also omits the fact that the **stockholders of the old railroad company re-**

ceived over $45,000,000.00 of common stock in the new company at par without paying one cent therefor (Rec., pp. 702-721; report of Special Master, p. 147).

Point 5 states that the Court held it was not inconsistent to file a bill against the railroad company as trustee ex maleficio for the excess freight charges when, prior thereto, an action at law for damages against the carrier, based on an order of reparation of the Commission, had been filed, and that such action was not such an election of remedies as defeated the right of intervenors to charge the railroad company as trustee ex maleficio, after the reparation claims had been reduced to judgment in the United States Supreme Court.

Under section 16 of the Act, the petition is upon the order, attaching it, and it is prima facie evidence, and the section further provides that: "A petition **for the enforcement of an order for the payment of money** shall be filed in the District Court * * * within one year * * *." Thus, the suit and judgment were, upon the orders of the Commission, directing the payment of the unlawful rates collected.

Point 6, page 10, states the holding of the Court in regard to the preferential claims of intervenors, held by the Court to be superior to the rights of other creditors, including bondholders, and adjudged to be prior in lien and superior in equity to the refunding mortgage and general lien mortgage of the St. Louis & San Francisco

Railroad Company and directed to be enforced against the property conveyed to the St. Louis-San Francisco Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case, and that said claims should be collected with interest from August, 1, 1916. This point likewise omits any reference to the fact, found by the Court, that the Railroad Company, its Receivers and successors, at all times, retained the money of the shippers and persistently contested their claims.

Petitioners, on pages 10, 11 and and 12, "REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI," set out seven reasons for the purpose of bringing this application within the statute governing the issuance of writs of certiorari by this Court, namely,

> Sec. 240 (a) of the Judicial Code, as amended February 13, 1925 (Chap. 229, Sec. 1, 43 Stat. 938; Sec. 1217, U. S. Comp. Stat. Cum. Supp. 1925), and Rule 35 of this Court, adopted June 8, 1925, effective July 1, 1925, 69 Law Ed. U. S. Sup. Ct. Repts. APPENDIX, pp. 1192-1193, amended June 7, 1926, West Reporter, U. S. Ad. Opinions, July 1, 1926.

Analyzing these said reasons, it will be observed:

That **Point 1** is based upon the alleged **subsequent finding** of the Commission as to the rate being unjust and unreasonable, and avers that, when the rates were collected, they were the regular and legally established rates, and further avers that the Court in holding that such rates

were wrongfully and unlawfully collected, had decided a **federal question** in a way in conflict with the applicable decisions of this Court.

It will be observed, as pointed out, supra, that the claim that the opinion was based upon said alleged "**subsequent finding**" is absolutely contrary to the holding of the Court. As to the alleged federal question, namely, that the rate was **lawfully collected** because in accordance with the published tariff, it will be pointed out, infra, in the argument that the holdings of this Court are to the exact contrary.

Point 2, page 10, is based upon the holding of the Court as to the trust ex meleficio doctrine arising from the collection of rates, **thereafter found by the Commission to be unjust and unreasonable** (the legally published rates at the time of collection), and avers that the Court had decided an important question of **general law** (the trust ex maleficio doctrine) in a way untenable and in conflict with the weight of authority, and has decided an important question of **federal law** (the collection of unjust and unreasonable rates, despite the published tariff) which has not been, but should be, settled by this Court.

It will be observed that the same erroneous premise as to said **alleged subsequent finding** is contained in **point 2** as in **point 1,** and it will also be observed that it is not denied that, if the excess charges were unlawful, because unjust and unreasonable, as found by the Commission (its

award affirmed by the judgment of this Court) and condemned by section 1 of the act, then the proper basis exists for the application of the trust ex maleficio doctrine.

Point 3, pages 10 and 11, relates to the holding of the Court to the effect that it was not necessary for intervenors to prove that the identical money that they had paid had been placed in a separate account, or to trace the identical fund in the hands of the carrier, in order to become preferred creditors, and stated that in so holding the Court had decided a question of **general law** in a way untenable and in conflict with the weight of authorities, and particularly in conflict with decisions of other Circuit Courts of Appeal on the same matter.

This is an erroneous statement of the holding of the Court, which is in harmony with the great weight of authority on this point, including the decisions of this Court, and is a correct application of the law to the facts found by the Court in its opinion. We have pointed out, supra, the exact facts upon which this holding of the Court was predicated, all of which are omitted from the statement of facts of petitioners and from their argument. There is not the slightest reference to the $300,000.00 **held at all times by the old railroad company in its treasury and paid over by it to the Receivers and the sum of over $5,000,000.00 paid by the Receivers to the new railway company.**

This is pointed out, supra.

Point 4, page 11, relates to the question of remedy and avers that the Court, in holding that the provision in the Commerce Act for enforcing reparation is not exclusive and did not preclude a bill to charge the railroad company as trustee ex maleficio, decided an important question of **federal law**, which has not been, but should be, settled by this Court.

This matter is considered very fully by the Court in its opinion (Rec., pp. 718-719), where the Court cites the famous Abilene Cotton Oil Company case, 204 U. S. 426-446, discussing the provision in section 22 of the act providing: "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The Court of Appeals points out that the right to impress a trust upon the fund must necessarily follow the establishment of the reparation claimed and that there could be no inconsistency nor could there be an election of remedies under the circumstances and that the intervention of respondents was in aid of the judgment of this Court, affirming the Commission's award of reparation, to secure the payment thereof. No execution could issue upon the judgment of this Court because of the status of the property transferred under the receivership foreclosure. Therefore, unless the bill to impress the trust could be maintained, respondents, fortified with the judgment of

this Court, would have been without remedy. The decision of the Court of Appeals is an exact application of the settled law to the facts of this case, in harmony with the Act and decisions of this Court.

Point 5, as to laches, page 11, and **Point 6**, as to the meaning of the decrees in the receivership suit, are not argued in the brief and are, therefore, we assume, not relied on.

As pointed out supra, these two points are so completely answered by the opinion of the United States Circuit Court of Appeals that they have been abandoned.

Point 7, page 12, relates to the holding of the Court that interveners have established preferential claims, superior to the rights of other creditors, to the extent of the judgment obtained by them against the Railroad Company in the District Court for the Western District of Missouri, with interest thereon from August 1st, 1916, and avers that this holding decided an important question of **general law** in a way untenable and in conflict with the weight of authority.

The holding of the Court on this point harmonizes with the great weight of authority, and especially with the decisions of this Court, as pointed out, infra, in the argument.

The rights of Respondents, established by the judgment of this Court, would be as "idle as a painted ship upon a painted ocean," if not made effective by the decree herein entered.

No one who has any just claim can be hurt by this decree as pointed out by the Court in its opinion (Rec., p. 721):

> "Other creditors, bondholders, mortgagees, stockholders acquired no interest of any kind in these excessive and unjust charges. Preferential allowance of the claims arising therefrom takes nothing from them to which they are entitled. The Railway Company received the property of the Railroad Company subject to these claims if allowed by the Court, as we have before pointed out, and hence suffers no wrong. Every consideration of equity and fair dealing demands that these claims should not be lost in a labyrinth of technicalities."

The petition concludes with the averment that the decree of the Circuit Court of Appeals is erroneous and that this case should be certified; prayer accordingly.

Summarizing the seven above points, it will be observed that it is asserted that the Court decided in **Point 1** a question of **Federal Law** in conflict with the decisions of this Court. In **Point 2**, a question of **general law** in conflict with the weight of authority and a question of **Federal Law** which has not been but should be settled by this Court; in **Point 3** a question of **general law** in conflict with the weight of authority; in **Point 4**, a question of **Federal Law**, which has not been but should be settled by this Court; and in **Point 7**, a question of **general law**, in conflict with the weight of authority.

Not a single reason has been adduced for granting the writ of certiorari in this case. The motive for this application is delay and more delay, and this is made manifest by the history of this controversy now drawn out to the extent of twenty-one years—to use Lord Thurlow's vivid expression, "to pluck the last hair from the tail of procrastination."

We now pass to the **"Brief in Support of Petition."**

After referring to the two cases below, pages 15 and 16, District Court opinion, and U. S. C. C. A. opinion, petitioners set out the **"Grounds on which jurisdiction of this Court is invoked."**

Under paragraph 2 of this head are set out "The specific claims advanced and rulings made in the lower court which are relied upon as a basis of this Court's jurisdiction." Then under paragraphs (a) to (f), both inclusive, pages 16 and 17, are set out the specific claims advanced by petitioners in the Court of Appeals.

The two first points, (a) and (b), viz., laches and meaning of decree, have been abandoned in the brief. The next points are: (c) Denial that the Railroad Company became trustee ex maleficio by collecting the "freight charged at the rates **then legally in effect**"; (d) denial that intervener could invoke the trust-fund doctrine; (e) the assertion that said trust-fund theory was inconsistent with and abrogated by the Commerce Act, and by the exclusive remedies for collection by reparation prescribed by that act; (f) that interveners' claims were not a preferred debt

of the railroad company, and, if allowable at all, could only be established as general unsecured creditors' claims.

On page 17 of petitioners' brief, paragraphs 1 to 6, both inclusive, are set out the alleged rulings of the Circuit Court of Appeals.

Paragraphs 1, laches, and 2, meaning of the decree, are not argued in the brief, and are therefore presumably abandoned. Paragraphs 3 to 6, both inclusive, are substantially the same as paragraphs 3 to 6, pages 9 and 10 of the petition, analyzed and discussed, supra, and contain the same errors of fact, viz., omissions of essential facts above pointed out, and constitute, we believe, a very distorted statement of the holdings of the Court of Appeals. **Nothing is easier than to convict a court of error by asserting an abstract holding and not giving the essential facts upon which that holding is based.** It is easy to knock down a straw man.

On page 18 of the brief is set out, under paragraph 3, the statutory provision under which this Court's jurisdiction is invoked, Section 248 of the Judicial Code, as amended February 13, 1925, and under paragraph 4, page 18, cases believed to sustain the jurisdiction of this Court, four in number, all of which will be discussed, infra, under the Argument.

"STATEMENT OF THE CASE" (Page 19) IN BRIEF.

The statement adopts the statement in the petition.

It is followed by "SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED," page 19.

The specification of errors contains eight grounds. Paragraphs 5, as to laches, and 6, as to the meaning of the decree, are presumably abandoned in the brief, as pointed out supra, and will not be argued.

Points 1, 2, 3 and 4 are an abbreviation of points 1, 2, 3 and 4 under the head, "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI," pages 10 and 11 of the petition, all of which have been heretofore discussed, and contain even in a larger degree omissions of important matters of fact, found in the opinion of the U. S. C. C. A., and pointed out supra, and are all predicated upon misconceptions of the holdings of the court below.

Points 7 and 8, page 19, are the same as point 7, page 12, of the petition, under the head, "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI."

Following the Specification of Errors is the Argument, under five heads, pages 20 to 35, both inclusive.

ARGUMENT.

I.

In the Brief of the argument counsel for Petitioners, in substance, makes the same points that are set out in "Reasons Relied on for Allowance of the Writ of Certiorari." In the first point they contend that the decision of the Circuit Court of Appeals held that the collection of legally-established rates becomes wrongful and unlawful because such rates are **subsequently** found by the Commission to be unjust and unreasonable and such holding is in conflict with the applicable decisions of this Court.

This is an erroneous statement of the decision and holding of the Circuit Court of Appeals. The Circuit Court of Appeals did not hold that the rates became wrongful and unlawful because such rates were **subsequently** found by the Commission to be unjust and unreasonable. The Circuit Court of Appeals decided and held that these rates to the extent of 3 cents a hundred pounds were wrongful and unlawful, **because they were unjust and unreasonable at the time they were collected.** The Circuit Court of Appeals did not hold that the rates became unlawful because the Commission found them unjust and unreasonable either before or after they were collected, but because they were unjust and unreasonable.

The Circuit Court of Appeals held that they were ipso facto unlawful, because to the extent that they were unjust and unreasonable they were unlawful both at common law and under section 1 of the act itself.

The actual holding and decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court, but is in harmony with the decisions of this Court and with the Act to Regulate Commerce itself.

Section 6 of the act was enacted to insure uniformity and to prevent discrimination of all kind, and, of course, we concede that, so long as the rate remains a published rate, the carrier must collect it and the shipper must pay it. But, because this is true, it by no means follows that a published unjust and unreasonable rate is a lawful rate.

Section 1 of the Act (effective in 1905) provided:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering and handling of such property shall be reasonable and just, and every **unjust and unreasonable** charge for such service is prohibited and declared to be unlawful" which was declaratory of the common law. (Bold-face type ours.)

In all the earlier cases for reparation before the Interstate Commerce Commission the carriers made the contention that reparation could not be ordered because the

carrier, when it collected the published rate, was collecting the legal rate, and, therefore, had a right to retain everything it collected under the published tariff, because when it collected the legal rate it obtained complete title to the entire amount collected.

It will be interesting to note how the Interstate Commerce Commission disposed of that contention. In the case of Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16 I. C. C. Reports, p. 97, the Commission said:

> "It has been said that the word 'legal' looks more to the letter and 'lawful' to the spirit of the law; that 'legal' imports rather than the forms of law are observed and the rules prescribed obeyed, and the word 'lawful' that the act is rightful in substance. The two words may aptly be used as illustrative of the distinction that we have attempted to draw in the cases cited. It is provided in section 6 of the act that no carrier shall collect or receive a greater or less compensation than the rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movement is, therefore, the legal rate. It is what the letter of the law requires the shipper to pay and the carrier to collect.
>
> "But the first section of the act, following the rule of the common law, declares that all charges for serv-

ices rendered by a carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or schedule of rates the carrier therefore acts under this admonition of the statute. * * * While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication cannot make a rate lawful that is unreasonable and excessive."

The underlying and basic idea of reparation is that the collection of an unjust and unreasonable rate is unlawful. If it were not unlawful, then the carrier, when it collected it, would obtain both the legal and equitable title to the unjust and unreasonable rate and could hold it as against the shipper and as against the world.

This holding of the Circuit Court of Appeals, instead of being in conflict with the decisions of this Court, has been sustained many times by this Court. In the case of Southern Pacific Company v. Darnell-Taenzer Co., 245 U. S. 531, the excessive freight charge had been passed on by the shipper to the consumer, and it was contended by the railroad company that the shipper had suffered no loss. This Court said:

"The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. * * * **THE CARRIER OUGHT NOT**

TO BE ALLOWED TO RETAIN HIS ILLEGAL PROFIT, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." (Black caps ours.)

If the exactions had not been unlawful, the claims could not have accrued at the time the exactions were made. The carrier receives the "**illegal profit**" when the exaction is made.

In the case of Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, the Interstate Commerce Commission found that the shipper was entitled to the excess charges as reparation. It was contended by the railroad company in this case that this was not a finding that the shipper had been damaged. The Court said on page 481 of the opinion:

> "What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction * * *."

In the case of Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, a recovery was denied because suit had not been filed within the time fixed by the statute. The Court said, on pages 665-6:

> "But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim

within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others."

The cause of action at once arose because the exaction was unlawful, at the time it was made.

The Circuit Court of Appeals, in the case of Darnell-Taenzer Co. v. Southern Pacific, 221 Fed., l. c. 894, which came to this Court and was decided in Southern Pacific Company v. Darnell-Taenzer Co., 245 U. S., supra, said:

"Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful."

In the case of Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, the Court said:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints for awarding reparation to individuals for wrongs

> unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

Of course, a wrong cannot be unlawfully suffered, if the act which causes the wrong is a lawful act.

This Court, in the recent case of Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel and Iron Co., U. S. S. C. Advance Opinions, Law Ed. 4, December 15, 1925, page 94, l. c. 101, held "the tariff rate, although **unlawful because excessive**, was, as between the shipper and carrier, the only legal rate." (Bold-face type ours.)

All of these cases of this Court were reparation cases and all of them hold that the exaction of an unjust and unreasonable rate is an unlawful exaction and unlawful at the time it is made. As the Master well said in his report (Rec., p. 165):

> "It can make no difference that in the interest of uniformity a shipper, before he can bring his action to recover, must secure a finding of the extent to which the rate is unreasonable and unjust. The basic act itself is unlawful. The prescribed procedural steps cannot affect the situation."

The procedural steps provided to determine the extent to which a rate was unjust and unreasonable were prescribed by Congress to insure uniformity.

The cases from this Court, cited by Petitioners, in support of their proposition, are not in conflict with the

holding and decision of the Court of Appeals on this point, as a brief analysis will demonstrate.

In the case of Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184, the shipper was attempting to recover, first, the amount of the difference between the rebate allowed to the plaintiff and the amount of the rebate allowed to another shipper; and, second, the difference between the tariff, or published rate, and the tariff, or published rate, less the rebate made to another shipper. The Court held that as to the first attempted recovery the parties were particeps criminis and that they would be left where they were. On the second proposition the Court held that the amount of the difference between the tariff rate and the tariff rate, less the rebate allowed the other shipper, was not evidence of the amount of the plaintiff's loss, and that, since he had not made any other proof of loss, there could be no recovery. The question as to whether or not a published, unjust and unreasonable rate was unlawful at the time of its collection was not before the Court at all, and the Court simply announced the familiar doctrine that a published rate was the legal rate in the sense that it was the only rate that could be charged by the carrier and collected from the shipper.

As we have already seen, the case of Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, where it considers the point involved here, ruled that the application of unreasonable schedules during the period, when such

schedule was in force, afforded the shipper grounds for legal complaint and a recovery for wrongs unlawfully suffered from such application.

However, the real point decided in the Abilene Cotton Oil Company case was that, in order not to destroy one of the objects of the Act to Regulate Commerce, which was to secure uniformity and to prevent discrimination of all kinds, the shipper must first go to the Interstate Commerce Commission to have the extent to which any given rate is unreasonable, established.

The case of Robinson v. Baltimore & Ohio Railroad Company, 222 U. S. 506, involved a question of whether a shipper could sue the carrier direct to recover the excess which he claimed to have paid under a rate attacked as unjustly discriminatory. The Court quoted at length (l. c. 510-511) the famous Abilene Cotton Oil case, supra, holding that such right on the part of the shipper would be inconsistent with the purpose of the act and followed the rule there announced. The quotation from this case in Petitioners' brief (p. 22) stops at a very convenient point. They have put a period after the word "effect." In the opinion a comma follows the word "effect," and the rest of the sentence is as follows:

> "* * * invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in anywise violative of the prohibitions of the act, and, if so, what, if any, injury had been

> done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation by an action in the Circuit Court of the United States if the carrier failed to comply with it."

Of course, this decision is not in conflict with the decision of the Circuit Court of Appeals. It is in harmony with that decision and the decisions, supra, of this Court.

Following this quotation in their brief (p. 22), counsel for Petitioners make an odd assertion. They say: "No order was or could have been entered by the Commission, in August, 1925, requiring a railroad company to cease and desist from collecting the rates held to be unreasonable for the future." It is true that no order was made requiring the carriers in this case to cease and desist. The finding of the Commission was that an order should be made requiring them to cease and desist from collecting the rate to the extent which the Commission ha found it to be unreasonable. Undoubtedly it did not make an order requiring the carrier to cease and desis from collecting the unjust and unreasonable rate because of the filing of the petition by the shippers for additional findings, but no one ever contended that the Commission did not, at that time, have power to make such an order, although it is true that the Commission did not,

at that time, have the right to fix rates, because it only got that right under the Hepburn Act, which went into effect, August 29, 1906.

The opinion of Judge Sanborn (288 Fed. 612, l. c. 629-30) is, of course, no authority for the proposition that the decision of the Circuit Court of Appeals reversing Judge Sanborn is in conflict with the decisions of this Court. Judge Sanborn's decision is clearly in conflict with the decisions of this Court.

This opinion undertakes to create an impossible conflict between Sections 1 and 6 of the Act, and then declares that "such an absurdity ought to be rejected." As often construed by this Court in cases, cited herein, there is no conflict between requiring the carrier to collect the published tariff rate and the right of the shipper to reparation for an unjust and unreasonable charge.

There is no real conflict between the decision of the Court of Appeals in this case and its decision in the case of C. B. & Q. R. R. Co. v. Merriam and Millard Co., 297 Fed. 1. In the last cited case the question involved was whether or not reparation could be recovered, in advance of a finding, or without a previous determination by the Interstate Commerce Commission, of the extent to which a rate was unjust and unreasonable. In that case the Interstate Commerce Commission had found a published rate to be unjust and unreasonable **for the future** and fixed a rate **for the future** which would be just and reasonable. There had been no determination by the Interstate Com-

merce Commission that the published rate would be unjust and unreasonable, up to the time that the new rate under the order of the Commission was to go into effect. The Court simply follows the Abilene Cotton Oil Co. case and held that, until the Commission had declared the existence of a right to reparation, an action in the courts to recover reparation could not be maintained.

In this point and in the Specification of Errors and in the "Reasons relied on for the allowance of the writ," petitioners' counsel persistently refer to the finding of the Commission made **"subsequently"** to the collection of these unlawful exactions. As a matter of fact, the Commission, before any of these unlawful exactions were made, to wit, August 16, 1905, had found these rates to be unjust and unreasonable and, therefore, unlawful, so that in this case the carriers continued to collect the unjust and unreasonable rate not only in the teeth of section 1 of the statute, declaring their action in that regard unlawful, but in the teeth of a positive and unequivocal finding of the Interstate Commerce Commission.

II.

In the second point of their brief of the argument counsel for the Petitioners combine the second and third "Reasons Relied on for Allowance of Writ of Certiorari" and the second and third points in their Specification of Errors. They say in the second point that the decision of the Circuit Court of Appeals that the railroad com-

pany became chargeable as trustee ex maleficio of the excessive charges collected by it, and that the trust fund doctrine could be invoked by the Respondents is erroneous and in conflict with the decisions of this Court, with the decisions of the same Circuit Court of Appeals and with the decisions of other Circuit Courts of Appeal on the same matter.

It should be borne in mind that this contest is really between the shippers on the one side and the railway company on the other. The stockholders of the old railroad company, under the findings of the Master (Rec., p. 147) and under the findings of the Circuit Court of Appeals (Rec., p. 702) received over $45,000,000.00 par value of the stock of the new railway company **without paying anything therefor.** The Circuit Court of Appeals (Rec., p. 718) said it is established by the record here that **at all times after the excessive freight charges were collected and down to the receivership** the railroad company had in its treasury money in excess of the claimed overcharges and that it turned over to the Receivers some $300,000.00 and that under the doctrine of the Love case it will be presumed that the money exacted by duress from the intervenors and their assignors for unjust and excessive freight rates was a part of the money in the treasury of the company which passed to the Receivers. No one else claimed any part of the $300,000.00 so turned over to the Receivers by the railroad company except Love, the complainant in the case of Love et al. v. North

American Company et al., 229 Fed. 103. His Honor, Judge Sanborn, decided that Love was not a preferred creditor. This same Circuit Court of Appeals reversed the decision of Judge Sanborn and held that Love was a preferred creditor and the petitioners paid the judgment directed in favor of Love by the Circuit Court of Appeals, but after this payment there was still at all times in the hands of the Receivers over $300,000.00 and turned over by them to the new Railway Company, a sum greatly in excess of the claims of Respondents. The Circuit Court of Appeals in this case followed the Love case, pointing out that there was no substantial distinction between this case and the Love case. The facts in this case, found by the Circuit Court of Appeals and by the Master, are that the railroad company commingled the moneys unlawfully exacted from the shippers with their own. **From the time of the first unlawful exaction, down to and including the date of the appointment of the Receivers, the railroad company had in its treasury a sum largely in excess of the claims of these respondents plus the claim of the complainant in the Love case.** It was contended by counsel for petitioners in the Circuit Court of Appeals that because respondents did not trace every dollar of the illegal exactions into this bank or that bank and did not show that it remained there, they had not traced their money. The railroad company did deposit their funds in several different banks, but, suppose they had kept their money in several different boxes today, one day taking money out

of one box and paying it out and another day taking money out of another box and paying it out, but always having in their boxes a sum in excess of the trust fund, would not the presumption be indeed that the railroad company had acted honestly and had paid out its own money, leaving in the boxes money belonging beneficially to respondents? What the Circuit Court of Appeals did in this case was to treat all of the boxes as one box. It held that since the railroad company always had in its treasury an amount in excess of the trust fund, the trust could be enforced on such excess. This decision properly understood is not in conflict with the decisions of this Court or with the decisions of the Courts of Appeals.

In the case of Angle v. Chicago, St. Paul & C. Rwy. Co., 151 U. S. 126, this Court said it is familiar doctrine that the party who acquires title to the property wrongfully may be adjudged a trustee ex maleficio in respect to that property.

In the case of Mercantile Trust Co. v. St. Louis & San Francisco Rrd. Co., 69 Fed. 193, which arose under an earlier receivership of this railroad, the Court, in that case (p. 197), said of this situation:

> "Two-fifths of all the money that went into the treasury of the company for fares of passengers represented unlawful and illegal exactions. That money it still has. No portion of it has been returned to the persons who were illegally forced to pay it. The sums illegally exacted from the interveners have never been

returned or tendered to them. It required eight years of litigation for the interveners to establish their own and the rights of the public in the premises. * * * When, as sometimes happens, a railroad company desires to avoid the payment of debts and obligations incurred in the operation of its road, or to reduce the wages of its employes below a fair and reasonable compensation for their services—there are not many such companies, but occasionally there is one—it seeks the aid of a friendly creditor, through whose agency it is quickly placed in the hands of a receiver, and immediately a court of equity is asked and expected to do the mean things which the company itself was unable or ashamed to do. But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party, and refuse to make restitution even of the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the Court as a trust fund should be made to respond to the payment of these judgments."

Also vid Richardson v. New Orleans Debenture Redemption Co., 102 Fed., p. 785 (C. C. A. 5th Cir.).

In commingling this trust money with its own money, the Railroad Company violated its duty as trustee, and the courts, in order to correct this situation, indulge every

presumption for the beneficiary. The proposition that no such narrow doctrine as that contended for by counsel for petitioners exists is shown by the case of Terre Haute and I. R. Co. v. Cox, 102 Fed. Rep. 825 (U. S. C. C. A. 7). In that case the Railroad Company commingled the trust fund with its own in its treasury. The Court said:

> "But it is insisted by the Indianapolis Company that the excess of operating expenses over the earnings of the Peoria Railroad necessitated and justified the withholding of the thirty percentum, and the record shows that a large sum of money came into the hands of the Receiver as a part of the estate at the time of their appointment. We may, therefore, we think, safely assume that that portion of the earnings which otherwise would have gone to the Peoria Company came into the hands of the Receivers, either as money at the time they took possession of the road, or as a benefit in virtue of the fact that they were consumed in the general operating expenses of the Indianapolis Company."

The Court, in this last-cited case, quoted from Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696. Formerly the equitable right of following misapplied money or other property into the hands of parties receiving it depended upon the ability to identify it. The equity attached only to the very property misapplied. This right was first extended to the proceeds of the property, viz., to that which was procured in place of it by exchange, purchase or sale, and if it became confused with other property of the same kind

so as not to be distinguishable without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as a better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving the party injured by the unlawful conversion a priority of right over the other creditors of the possessor in this case; that, when the railroad company commingled these unlawful exactions with their own money, the shipper's equity became a charge upon the entire mass in the treasury of the company. It makes no difference that part of the money may have been deposited in one bank to the railroad's credit and part in another. No matter how many banks it may have been deposited in, the railroad company remained in control of it and, at all times, the money was in the treasury of the railroad company, as was held by the Circuit Court of Appeals. The narrow contention of counsel for petitioners would take us back to the old rule that every dollar had to be earmarked. The Circuit Court of Appeals, in the case of Terre Haute I. R. Co., supra, said:

> "Clearly, then, the Indianapolis Company in its own right could not oppose the restoration of these moneys to the Peoria Company."

The railroad company clearly in that case could not oppose the restoration of these moneys to the Peoria Company and neither can the railway company in this case to respondents. Not only did the amount in the treasury,

from the time these unlawful exactions were made, exceed the trust fund; not only did the railroad company turn over to the Receivers a sum greatly in excess of these unlawful exactions from its treasury, but there never was a time, after the appointment of the Receivers, that the moneys in their treasury did not greatly exceed the trust fund, as was found by the Master and the Circuit Court of Appeals. The Receivers turned over to the railway company over $5,000,000.00, after paying all operating charges, all taxes, interest on bonded indebtedness and after taking up car trust certificates issued before the receivership.

The above principles were declared in the leading case of Central National Bank of Baltimore v. Connecticut Mutual Life Insurance Co., 104 U. S. 54, 26 Law Ed. 693, in which the syllabus was written by Mr. Justice Matthews, the author of the opinion. The syllabus (paragraph 3, page 694) is as follows:

> "That, so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, are established doctrines of equity and apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created, as well as to every other description of property."

This proposition is discussed in the opinion, 26 Law Ed., l. c. 699-701. The Court reviews the English cases on this subject and points out that the original doctrine, requiring money to be earmarked, or specifically identified, had been abandoned in cases of trust relationship. The Court cites the opinion of Vice-Chancellor Sir W. Page Wood, as follows (l. c. 699):

> "Vice-Chancellor Sir W. Page Wood, in **Frith v. Cartland**, 2 Hem. & M. 420, said that **Pennell v. Deffell** rested upon and illustrated two established doctrines. One was that 'So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.' The second is, 'That if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.' "

Again the Court said (l. c. 700) (after quoting the opinion of the Master of the Rolls, Sir George Jessell, as set out in the rule announced in the headnote above):

> "He adopts the principle of **Lord** Ellenborough's statement in **Taylor v. Plumer**, 3 M. & S. 562, that 'It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in **Scott v. Surman**, Willes 400, or into other merchandise, as in **Whitcomb v. Jacob**, 1 Salk. 161, for the product or

substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail.' But he dissents from the application of the rule made by **Lord** Ellenborough when the latter added, 'which is the case when the subject is turned into money and confounded in a general mass of the same description,' for equity will follow the money, even if put into a bag, or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The Court of Appeals had previously applied the very rule as here stated in the case of **Birt v. Burt**, reported in a note to **Ex parte Dale & Co.**, L. R., 11 Ch. D. 773."

The Court further added that the principles, above enunciated, had been illustrated by many cases in the United States, citing and analyzing a number of such cases, l. c. 700.

This case on this point has been cited and followed by this Court, by the lower federal courts and by nearly all of the state courts. It would be useless to attempt to give this vast mass of citations, but, in addition to the cases of Cox and Richardson, above quoted, citing and following this case, we refer to the two following cases: Smith v. Township of Au Gres, 150 Fed. 257, l. c. 260-265, 9 L. R. A. (n. s.) 876, and 80 C. C. A. 145 (6th Circuit). This case contains an excellent discussion of the doctrine, above announced, and quotes (l. c. 261) from the opinion

of Chancellor Kent in Hart v. Ten Eyck, 2 Johns. Ch. 62, l. c. 108, as follows:

> "If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it."

This is as strong a statement of the rule of presumption as can be found on this subject and amply supports the presumption invoked both in the Love case and in the instant case.

The case of Standard Oil Company of Kentucky v. Hawkins (C. C. A., 7th Circuit), 74 Fed. 395, l. c. 395-402, reviews the authorities on this subject and cites and follows the rule announced in the Central National Bank case, supra. The Court traces the history of this doctrine, citing the English authorities and their application in the American decisions. The Court cites (l. c. 401-2) the opinion of Mr. Justice Bradley in Frelinghuysen v. Nugent, 36 Fed. 229, 239, which language is quoted with approval in Peters v. Bain, 133 U. S. 670, 693, in which he points out and disapproves the old equitable doctrine as to the necessity of exact identification of a trust fund or trust property commingled with others, and adds:

> "Finally, however, it has been held as the better doctrine that confusion does not destroy the equity

> entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

The Court (l. c. 402) cites numerous cases, announcing the same proposition, and states that the Central National Bank rule had been followed in Peters v. Bain, 133 U. S. 670.

The principles above stated have an even stronger application to the facts in the instant case, because in the cases above quoted **the trust doctrine arose out of conventional agreements of the parties, whereas, in the instant case the money of the shippers was extorted under duress and under the compulsion of the statute,** and, under the theory of the Reparation Provision of the Commerce Act, constituted a trust fund, which must be restored to the shipper.

In the case of Smith v. Mottley, 150 Fed. 266 (C. C. A., 6th Circuit), l. c. 268, the Court again discusses the commingling of trust funds and the rights of the beneficiary. The Court refers to the Au Gres case, decided by it (150 Fed. 267), and reannounces the same doctrine, citing additional cases in support thereof.

The Court said (l. c. 268) that it was shown that **three times the amount of the trust fund claimed remained in the bank from the time of payment to the time of the assignment and came to the trustee.** The Court added:

"The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner; but, when this is done, the burden shifts to the wrongdoer. It is for him to distinguish between his own property and that of the innocent party" (citing a number of cases).

The cases cited by counsel for petitioners are not in conflict with the decision of the Circuit Court of Appeals in the instant case. When the different states of facts are considered, those cases are in harmony with the decision of the Circuit Court of Appeals.

In the case of City of Litchfield v. Ballou, 114 U. S. 190, 29 Law Ed. 132, the city had issued bonds which this Court held to be void, because they were issued in violation of the state Constitution. Thereupon, the purchaser of the bonds brought a suit in equity on the theory that, notwithstanding the bonds were wholly invalid, the city was in possession of the money, received for the bonds, or its equivalent in property identified as having been procured with the proceeds of the bonds. The evidence showed that the money represented by the proceeds of the bonds had long since passed out of the hands of the city. However, the evidence showed that some of the proceeds of the bonds had gone into a water works plant. A large part, however, of the money, which had gone into the water works plant, was obtained by taxation, or from other resources of the city. It was not ascertainable how much. The land, on which the work was constructed, was

purchased before the bonds were issued. The streets, through which the pipes were laid, were public property into which no money of the complainants had entered. In connection with the allegations in the bill that the city was in possession of the money, the Court said (l. c. 133):

> "The money received by the city from Ballou has long passed out of his possession and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control."

Speaking about the tracing of the money into the water works property, this Court used the language set out in petitioners' brief. In this case respondents have traced **their money into the treasury of the railroad company and from the treasury of the railroad company into the hands of the Receivers, and from the hands of the Receivers into the hands of the railway company**, and have showed that the stockholders of the old railroad company obtained over forty-five million ($45,000,000.00) dollars of the stock of the new railway company without paying anything for it.

Here respondents' money can be reclaimed and delivered without taking others' property with it and without injury to other persons, or interfering with others' rights. Moreover, the decree of the lower court appealed from in this Ballou case did not proceed upon the trust fund theory. It found a debt from the city to Ballou and

impressed a lien upon the water works plant for the payment of that debt. This Court held that that was as much within the condemnation of the constitutional provision as the express contracts evidenced by the bonds.

The case of Schuyler v. Littlefield, 232 U. S. 707, 58 Law Ed. 806, simply announces the familiar doctrine:

> "Trust funds deposited by a trustee in his individual bank account are dissipated if the mingled fund is at any time wholly depleted, and cannot be treated as reappearing in sums subsequently deposited to the same account."

The next case cited is Empire State Surety Co. v. Carroll County, 194 Fed. 593 (U. S. C. C. A., 8th Circuit).

In this case Judge Sanborn (l. c. 604-605) undertakes to announce the rules governing the enforcement of a trust against the proceeds of an insolvent estate in the hands of a receiver. After announcing the general rule:

> "It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the Receiver" (citing l. c. 604 and a number of cases),

the Court stated (l. c. 605) the second rule on this subject, which is as follows:

> "Proof that a trustee mingled trust funds with his own and made payments out of the common fund

is a sufficient identification of the remainder of that fund coming to the hands of the Receiver, not exceeding the smallest amount the fund contained subsequent to the commingling (Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. [n. s.] 1100; Weiss v. Haight & Freese Co. [C. C.], 152 Fed. 479; American Can Co. v. Williams, 178 Fed. 42, 423, 101 C. C. A. 634, 637) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred (Board of Com'rs v. Patterson [C. C.], 149 Fed. 229, 232; Spokane County v. First National Bank, 68 Fed. 979, 16 C. C. A. 81)."

This rule fits the facts found in the instant case, viz., **the $300,000.00, at all times held by the carrier, the Receivers and successor,** and accords with the finding of the Circuit Court of Appeals in this case (Rec., p. 718), **that the excess freight rates collected by the carrier were part of the moneys in the treasury of the company, which passed to the Receiver.**

The next case cited is the case of Winfield v. Alva Security Bank, 232 Fed. 847 (U. S. C. C. A., 8th Circuit). In this case the complainants had purchased forged notes from the cashier of the Alva Bank. The complainants had credited the Alva Bank with the purchase price of these notes. Subsequently, these credits were entirely exhausted by drafts **and there was no evidence that any part of the fund ever reached the Alva Bank.** What was said by the

Court in this Alva Bank case, **after finding that there was no evidence that any of the proceeds of the forged notes ever reached the bank,** may have been right on the facts in that case, but is not authority on the facts in this case. Whatever may have been the principles announced in that case, they are clearly inapplicable to a reparation case like this, the principles governing which have been stated by the United States Circuit Court of Appeals in this and the Love case. Certainly the robust morality of the opinion of the United States Circuit Court of Appeals in the instant case must appeal to all fairminded persons. One of the deep-seated convictions of Congress, as reflected by its legislation, namely, the Carmack Amendment, and the Elkins Act, designed "to cut up by the roots every form of discrimination, favoritism and inequality" (U. S. v. Koenig Coal Co., U. S. S. C. Adv. Opinion, May 1, 1926, No. 12, p. 488, l. c. 490), and by the provisions of the Commerce Act, was to protect the shipper in the wholly unequal fight with the carrier. It is very easy for the carrier to get the shipper's money, and Congress, as shown by its legislation, as construed by this Court, **is determined that the shipper shall get it back,** and has even gone to the extent of authorizing the assessment of attorneys' fees in favor of the defrauded shipper. It is the clear intent of Congress, as shown in the Commerce Act, to restore to the shipper all unjust and unreasonable charges, plus interest from the date of payment, and attorneys' fees, thereby penalizing the carrier and

predisposing the carrier to treat the shipper fairly and not litigate his just claims with him, in season and out of season, day and night, Sundays and holidays, for a period of twenty-two years, during which time an opportune financial receivership is invoked to entirely defeat the shipper, though the stockholders of the railroad company in receivership are enriched at the expense of its creditors to the extent of over forty-five millions of dollars.

The next case cited is the case of Federal State Bank v. McFarlin, 257 Fed. (U. S. C. C. A. 8th Cir.).

This case involved the distribution of assets of a bankrupt grain company and merely announces the general proposition, citing the Carroll Company and Alva Bank cases, supra, that a claimant, whose property has helped to swell the general assets of a party, subsequently becoming bankrupt, has no prior right in those general assets without specific identification or tracing of the claimant's property.

There was no proof that a large fund **claimed by no one except the interveners was carried at all times by the zankrupt company, both before and after bankruptcy.**

The next case cited, Scullin Steel Co. v. North American Co., 255 Fed. 945 (U. S. C. C. A., 8th Circuit), merely announces the proposition that, where **there is collusion and fraud between the agent of the shipper and the agent of the carrier, and the carrier had no notice of such fraud and was not enriched by it, the money so siphoned from**

the shipper could not be treated as a preferred claim over other creditors of the carrier.

The next case cited is Weideman v. Newton Arms Co., 271 Fed. 302, 304 (C. C. A., 2nd Circuit), in which the Court held that, where a trust claim was asserted on the ground that money had been secured from claimant by the false representations of a corporation, it was necessary to show, first, that such representations were relied on, and, second, trace their money into some particular property or fund which came into the hands of the Receiver; and it is not sufficient to show that it was used by the corporation generally in its business.

In that case the Court pointed out (l. c. 303) that the cash on hand had fluctuated down to zero, with liabilities of $400,000.00, and that all that claimants could prove was that their money was spent in carrying on the business or procuring certain articles of machinery and the like, which ultimately passed into the Receiver's hands (l. c. 304).

How can this holding fit the facts in the instant case?

The next case cited is Titlow v. McCormick, 236 Fed. 209, l. c. 214, 215. This case involved the distribution of the assets of an insolvent bank, where a trust was asserted by one claimant. This case cites and follows (l. c. 211) the Schuyler case, 232 U. S. 707, analyzed supra. This case also announces the doctrine (l. c. 214) that, where a trust fund has been commingled with other funds, still claimant is entitled to recover if there remained in the possession of the bank a sum of money equal to the amount due him,

"IT BEING THE PRESUMPTION OF THE LAW THAT, IF MONEYS HAD BEEN DISBURSED OUT OF SUCH FUND, IT WAS THE MONEY WHICH THE BANK HAD THE RIGHT TO PAY OUT, AND NOT THE MONEY WHICH WAS ENTRUSTED TO IT IN A FIDUCIARY CAPACITY." (Black caps ours.) Again, l. c. 215, the Court announces the same rule, quoting the case of Brennan v. Tillinghast, 201 Fed. 609-614 (C. C. A., 6th Circuit), where the Court declared that, when trust funds were mingled with other funds there was a presumption of law **"THAT THE SUMS FIRST DRAWN OUT WERE FOR THE MONEYS WHICH THE TORT FEASOR HAD A RIGHT TO EXPEND IN HIS OWN BUSINESS, AND THAT THE BALANCE WHICH REMAINED INCLUDED THE TRUST FUND WHICH HE HAD NO RIGHT TO USE."** (Black caps ours.)

In the Titlow case the Court applied this principle and established a trust to the extent of the unexpended deposit.

In the instant case, we repeat, there was always over $300,000.00 in the treasury of the carrier upon which interveners' trust lien remained, and which was not dissipated in any manner, and upon which no other claimant asserted rights.

The last case cited on this point is the case of U. S. National Bank of Centralia v. City of Centralia, 240 Fed. 93 (U. S. C. C. A., 9th Circuit). This case involved the

distribution of the assets of an insolvent bank in a receiver's hands, and announces (l. c. 95) this proposition:

> "The law impresses a trust upon funds (trust funds so misapplied, that is commingled with other funds) and to the extent that the said money or any portion thereof, either in its original or a substituted form, can be traced into the fund which came into the possession of the Receiver, the appellee is entitled to a preference over the general creditors" (citing the Titlow, Schuyler and Brennan cases, supra).

The Court held in the Centralia case **that there was no proof that claimant's moneys ever came to the Centralia bank or were traceable to any fund that came to the Receiver's hands, and, therefore, there could not be any recovery upon the trust theory.** How this case applies to the facts of the instant case, we cannot conceive.

Since the provisions of the Commerce Act require uniformity as between shippers, the same uniformity is required in the enforcement of reparation—a restitution of money unlawfully taken by the carrier from the shipper. This restitution presupposes priority of payment and necessarily establishes the basis for the enforcement of the trust ex maleficio doctrine, when a carrier, owing reparation to a shipper, has gone into the hands of a receiver. If this were not true the basic uniformity required by the Commerce Act would be destroyed, because the solvent carriers, participating in the collection of an unlawful rate from the shipper, condemned by the act as unjust and

unreasonable, would be forced to make restitution; whereas, the carrier in the hands of a receiver, administered by a court of equity, would appropriate the reparation due the shipper, and thereby create a preference and advantage to the carrier in the hands of a receiver and a discrimination against the shippers on such road. No wonder that Judge Caldwell, in the case of Mercantile Trust Company v. St. Louis and San Francisco Railroad Co., above quoted, 69 Fed. 193, l. c. 198, indignantly denounced such effort of the carrier (a prior receivership of this same railroad company) to escape reparation liability via the receivership route. The Commerce Act is just as applicable, as shown by its provisions, to carriers, operated by receivers, as to the corporation performing the carrier's service, and the same equality of duties, responsibilities and uniformity of rates applies under the provisions of the act to the receiver of the carrier as to the carrier not in receivership. As to the general obligation of the receiver to pay claims and do exact justice as to a preferred claimant, asserting a trust, vid. Standard Oil Co. v. Hawkins, 74 Fed. 395, l. c. 402.

The receiver of a carrier cannot in equity be the agency to accomplish prohibited discrimination and the destruction of the basic uniformity in rates, prescribed by the act, by refusing to recognize a reparation order of the Commission, affirmed by the judgment of this Court. It is because of the rule of uniformity that the proceeding to have the rate declared unreasonable, therefore unlaw-

ful, with consequent reparation to the shipper, is not a proceeding of a private nature, but of a public nature, so as to afford the foundation of an order for repayment to all shippers affected, though not parties to the proceeding.

> Baer Bros. Merc. Co. v. D. & R. G. R. R. Co., 233 U. S. 479, l. c. 486-7, 58 Law Ed. 1055, l. c. 1060; Phillips v. Grand Trunk R. R. Co., 236 U. S. 662, l. c. 665, 59 Law Ed. 774, l. c. 776.

The whole effect of Petitioners' argument is that there is no basis for the application of the trust ex maleficio doctrine because of the alleged fact that the excess charges were "**lawfully**" collected from the shippers, because under the published tariff. We have shown by repeated decisions of this Court that this contention is an obvious fallacy and the collection of such unjust and unreasonable charges is not and could not be "**lawful,**" because such holding would destroy the basic right to reparation. With this fallacious premise exploded, it is not denied by petitioners that a trust ex maleficio did arise.

The chief remaining question, therefore, is whether or not there has been a sufficient identification and tracing of the excess charges, paid by the shippers, to authorize their recovery in the manner and form decreed by the United States Circuit Court of Appeals, and this is discussed fully, supra.

ALLEGED CONFLICT WITH PRIOR DECISIONS OF THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Two of the grounds advanced for the granting of the writ of certiorari is that the decision of the Circuit Court of Appeals in this case is in conflict with other decisions of the same Circuit Court of Appeals, both as to the trust fund theory and identification of the fund. As we have heretofore showed, when the facts in this case are analyzed and differentiated from the facts in those other cases, there is no conflict. The case of Love v. North American Company, 229 Fed. 103, is the only case decided on facts identical with the facts in this case.

The controlling principle in the Love case is cited and approved by the opinion of the United States Circuit Court of Appeals in the instant case (Rec., p. 717), quoting from the Love case, 229 Fed. 103, l. c. 106, and in said opinion of the United States Circuit Court of Appeals in this case (Rec., p. 718) the Court adds that the Love case,

> "is the latest expression of this Court on the subject, and is authority for the proposition that in order to establish a trust in a railroad company for the benefit of the shipper as to freight charges, wrongfully exacted, it is not necessary to show that the identical money received has been placed in a separate account or to trace the identical fund."

The Court further cites from the Love case (Rec., p. 717):

> "The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company, itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the Receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasurer of the company which passed to the Receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration."

The Court carefully considered the Carroll County case, 194 Fed. 593-604, and the various other cases, now cited

by the petitioners in this application. Counsel for petitioners attempt to distinguish the Love case from this case. They made this same attempt before the Master and before the Circuit Court of Appeals and advanced the same points. The answer of the Master is found on pages 175-177 of the record. The Circuit Court of Appeals held that there was no substantial distinction between the instant case and the Love case when the same points were reargued before it. As heretofore stated, when the facts in the various cases are considered, there is no conflict between the decision of the Circuit Court of Appeals in this case and prior decisions of the same court; but conceding, arguendo, which we deny, that there is such conflict, still, under the rules of this Court, such conflict would be no ground for granting a writ of certiorari.

The Circuit Court of Appeals in this case pointed out that there was no conflict between its opinion in this case and any of its prior decisions and followed the Love case, announcing that the doctrine of the Love case was correct and should be and would be followed.

III.

Paragraph III of the brief, page 30, announces this proposition:

> "The trust fund theory is inconsistent with, and is abrogated by, the exclusive remedy for collection of overcharges prescribed by the Act to Regulate

Commerce; and the decision of the Circuit Court of Appeals that the equitable remedy is not inconsistent with the remedy by reparation is erroneous."

This proposition is discussed at length in the opinion of the United States Circuit Court of Appeals (Rec., pp. 718-721). The Abilene case is there discussed (Rec., pp. 718-719). The opinion of the District Court, 288 Fed., l. c. 630, on this point, was carefully considered by the United States Circuit Court of Appeals. The purpose of the Commerce Act and of the other acts of Congress regulating carriers, as above stated, is to give the shipper full relief in recovering excess charges, and so these acts have been construed by this Court.

The Ballou case, 114 U. S. 190-194, has been discussed supra and it is not necessary to reanalyze it.

The Keogh, 260 U. S. 156, here cited, was also cited by petitioners under the head of jurisdiction. It supports neither the jurisdictional proposition nor the question of the **asserted exclusive remedy for collection of overcharges**, prescribed by the Act to Regulate Commerce, which petitioners insist abrogates the trust fund theory.

In the Keogh case a suit was filed under Section 7 of the Antitrust Act, and the only question (l. c. 161) was whether there was a cause of action under section 7. The charge in that case was that the carriers had combined to fix rates for the transportation of excelsior and flax tow, and that Keogh, plaintiff, had been damaged under section 7 by such alleged combination, because deprived

of the benefit of competitive rates, and that the elimination of competition had increased his rates. The Court held, through Mr. Justice Brandeis, that there was no right of action in that case, because there was nothing to show that plaintiff was damaged by the alleged combination. The Court pointed out with great care (l. c. 165):

> "It (the claim of plaintiff) is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate (Southern Pac. Co. v. Darnell Taenzer Co., 245 U. S. 531, 62 Law Ed. 451)."

The Court again, in this case (l. c. 163), declared:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published rate. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier" (citing a number of cases).

The Court in this case, on the prior page, 162, points out what rates are legal under the Act to Regulate Commerce, and states:

> "Under section 8 of the latter act the exaction of an illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation,' together with a reasonable attorney's fee. Sections 9 and 16

provide for the recovery of such damages, either by complaint before the Commission or by an action in a federal court."

From these excerpts it is perfectly apparent that the Court had in mind the **distinction between the legal published rate and the rights of a shipper to recover from a carrier the amount by which its exaction exceeded the legal rate.**

In the Keogh case no question of election of remedies was considered and there was no discussion of the alleged abrogation of the trust fund theory by sections 9 and 16 of the Commerce Act. The same observation applies to the Ballou case, 114 U. S. 190-194, cited under this point.

The last case cited under this point is Butler v. Western German Bank, 159 Fed. 116, l. c. 117 (U. S. C. C. A., 5th Circuit), in which the distribution of the assets of an insolvent bank was involved, and the Court held that interest was not recoverable on the fund withheld, and, also, that, where a bank, known by its officers to be insolvent, collected money for a customer and mingled the same with its own funds which, to an amount larger than the sum received, passed it to the bank's Receiver in insolvency, the customer, though unable to trace the identical money into the Receiver's hands, was entitled to recover from the Receiver an amount equal to that collected, citing and following the above-quoted case of Richardson v. New Orleans Deb. Red Co., 102 Fed. 780, based upon the Central National Bank case, 104 U. S. 54. Not one

of the above cases discusses the points involved in the instant case, or the effect of Section 22 of the Commerce Act, providing, in substance, **that the remedies provided by the act shall not in any way abridge or alter the remedies now existing in common law or by statute, but the provisions of the act are in addition to such remedies.**

Furthermore, not a single one of these cases discusses election of remedies or the fundamental maxims of equity governing in this case.

The fundamental basis of reparation under the Commerce Act has been discussed, supra, and no repetition is needed. The two maxims, "Ubi jus, ibi remedium" (legal), and the corresponding equitable maxim, "Equity will not suffer a wrong without a remedy," have been cited and applied innumerable times by the federal and state courts. They are two corner stones of well-ordered jurisprudence and absolutely essential to cut through the "labyrinth of technicalities" and do justice. See the following authorities:

Broom on Legal Maxims (8th Ed., p. 101 et seq.), citing the celebrated case of Ashby v. White, 2d Ld. Ryam. 953, and also the famous opinion of Chief Justice Marshall in the case of Marbury v. Madison, 1 Cr. 137, 2d L. Ed., p. 60;

Pomeroy's Equity Jurisprudence, Vol. I, Sec. 423;

Toledo, A. A. & N. M. Ry. Co. v. Penn. Co. et al., 54 Fed. 746, l. c. 751, 752;

Southern California Ry. Co. v. Rutherford et al. (Circuit Court, Southern District of California, June 30, 1894), 62 Fed., l. c. 797, 798;

Harrigan v. Gilchrist, 99 N. W. 909;
Mercantile Trust Co. v. St. Louis & San Fransisco Ry. Co., Ogden et al., Interveners, 69 Fed. 193;
Sweet v. The Montpelier Savings Bank & Trust Co., 69 Kan. 641 (77 Pac. 538);
Matthews v. Forslund, 112 Mich. 591;
Barksdale et al. v. Finney et al., 14 Grattan 338;
Williams v. Young, 81 Atlantic 1118;
Traders' Bank v. Fraser, 162 Mich. 315, l. c. 318;
Converse v. Sickles, 44 N. Y. Supp. 1080 (affirmed in 161 N. Y. 666);
Sugar Refining Company v. Fancher, 145 N. Y. 552, l. c. 561.

Some of the cases, just cited, also announce the proposition that a judgment at law is, in many cases, not such an election of the remedy as will preclude a bill in equity to impress a trust, because there is no inconsistency whatever between the two proceedings.

In conclusion on this point the case of Southern Pacific Co. v. Bogert, 250 U. S. 482, is particularly strong on the proposition that there is no election of remedies, when the relief subsequently sought is of a different character and in aid of the original rights.

Also, see on this point, the case of Standard Oil Co. of Ky. v. Hawkins, 74 Fed. 395, l. c. 397-399, in which the doctrine of election of remedies is discussed at length and it is held that resort to a prior remedy will not preclude claimant from filing a bill to impress a trust upon the fund.

Also see the reasoning of the Circuit Court of Appeals on this point (Rec., pp. 718-719), which is very convincing.

IV.

The fourth paragraph of the brief, page 33, announces this proposition:

> "The decision of the Circuit Court of Appeals allowing interest on respondents' claims from a date subsequent to the date of appointment of the Receivers is erroneous."

The right to interest in this case, upon the reparation judgments entered, is settled by the Sloss-Sheffield case, citing many authorities and quoted, supra (U. S. S. C. Ad. Opin., Law. ed. No. 4, Dec. 15, 1925, l. c. 103).

The Receivers continued to contest the claims of respondents and continued to withhold their money from them and the railway company continued to contest the claims of the respondents and is now contesting their claims.

The Receivers stand in the shoes of the carrier and in withholding the trust fund elect to pay interest thereon, if the Court subsequently decrees that such must be returned.

The Receivers, at any time, could have terminated their obligation to restore the trust fund and their obligation to pay interest thereon by making restitution. This, like-

wise, is true of the new railway company, which obtained the fund from the Receivers.

Since they elected to continuously litigate a preferred claim, they must now pay interest, particularly since, as pointed out in the opinion of the United States Circuit Court of Appeals in this case, no one has any just claim to this trust fund except respondents, and, therefore, no one can be prejudiced by the payment of principal and interest.

V.

Point V of the brief, page 34, announces this proposition:

> "The decision of the Circuit Court of Appeals that respondents were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, is erroneous."

This proposition is not argued in Petitioners' brief and it involves the consideration of the entire case, which is completely covered in the discussion in this brief, supra.

CONCLUSION.

In conclusion, we believe that it has been demonstrated that no grounds for the issuance for a writ of certiorari in this case have been shown by petitioners.

The trust fund doctrine in this case is well supported by the recent decision of this Court in the case of Dayton-

Goose Creek Ry. Co. v. U. S., 263 U. S. 455, in which the Court construed the recapture clause of the Transportation Act and held that **as to the excess the carrier never had title.** Necessarily the same principle applies to excess freight rates collected under a published tariff, because prohibited by the Commerce Act as unjust and unreasonable.

We have an abiding conviction in the justice of respondents' claims, and, though the course of this long litigation would seem to indicate that at some time there had been some doubt as to the collection of these claims, and that technicalities would triumph over justice, we now feel certain that the long-delayed rights of these cattle shippers will be sustained by this tribunal and that the application for certiorari will be denied.

Respectfully submitted,

S. H. COWAN,
DAVID A. MURPHY,
JOHN A. LEAHY,
WALTER H. SAUNDERS,
Attorneys for Respondents.